

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

WEST WRENTHAM VILLAGE, LLC,)	
)	
Appellant)	
)	

v.

No. 05-04

TOWN OF WRENTHAM,)	
ZONING BOARD OF APPEALS)	
Appellee)	
)	

RULING ON MOTION TO DISMISS

I. PROCEDURAL HISTORY

On October 20, 2004 West Wrentham Village, LLC (WWV) filed an application for a comprehensive permit with the Town of Wrentham Zoning Board of Appeals (Board) to build a 31 unit condominium development at 1694A West Street in the town of Wrentham. The project would be funded under the Massachusetts Housing Finance Agency's Housing Starts program. The Board decided by a written decision dated February 10, 2005 that the proposed project is not consistent with local needs and denied the application. The Board also found that the Town of Wrentham has met the 10% Housing Unit Minimum threshold described in G.L. c. 40B, § 20. (Also see 760 CMR 31.04(1)a.) On February 17, 2005, WWV filed this appeal.

At the Conference of Counsel held pursuant to 760 CMR 30.09(4)(a) on March 9, 2005, attorneys for the Board, WWC, and abutters agreed that the Committee should address the threshold issue concerning the statutory minimum under 760 CMR 31.04(1)(a). On April 13, 2005, the Board submitted its motion to dismiss this appeal based on its belief that the Town of Wrentham has satisfied the Housing Unit Minimum thereby precluding review by this body.

II. DISCUSSION

Under the Comprehensive Permit Law, the decision of a local zoning board of appeals is consistent with local needs as a matter of law when the town has low or moderate income housing in excess of 10% of its total housing units. G.L. c. 40B, § 20. This is referred to as the Housing Unit Minimum, and is in effect an affirmative defense available to boards of appeal before this committee. *East Homes Trust v. Tyngsborough*, No. 02-37, slip op. at 2 (Mass. Housing Appeals Committee July 21, 2003). The regulations for computing the Housing Unit Minimum charge the Department of Housing and Community Development (DHCD) with creating and maintaining a Subsidized Housing Inventory (SHI) for the communities of Massachusetts to be used to measure their progress toward the Housing Unit Minimum. 760 CMR 31.04(1)(a). This inventory is guided by the definition of low or moderate income housing contained in 760 CMR 30.02 which gives a general description and then specifies programs that count toward the Housing Unit Minimum. For each of the specified programs, DHCD either has to approve the units or receive certification from another government entity that the units are affordable.¹ DHCD has maintained this list

1. Housing created under G.L. c. 44B, §§ 3-7 must be certified annually by the appropriate city or town to DHCD. Accessory apartments with income restrictions must be approved by DHCD. Local initiative units must meet all requirements of 760 CMR 45.03 and then must be approved by DHCD pursuant to 760 CMR 45.02 before they can be counted toward the SHI.

since 1978, and currently updates it every two years. DHCD also maintains an Eligibility Summary which lists programs whose housing generally qualifies towards the Housing Unit Minimum and those that generally do not.² According to the Board, SHI lists Wrentham as having 3,477 housing units of which 147 are affordable. This would mean that only 4.2% of Wrentham's housing units are affordable, well below the Housing Unit Minimum of 10%.

The Board contends that the housing provided to residents of the Wrentham Developmental Center (WDC) should count toward the Town of Wrentham's Housing Unit Minimum, and that this inclusion would indisputably raise the town above the 10% threshold and thus preclude review of their decision. WWV believes that the decision of DHCD and the Department of Mental Retardation to ignore these units is proper and that its application to the Board was consistent with local needs.

A. The Process for Challenging the Subsidized Housing Inventory

Challenges to the Subsidized Housing Inventory are carried out pursuant to 760 CMR 31.04(1)(a) and 31.06(5). The Board has the burden of proving that a particular statutory *minimum* has been met. 760 CMR 31.06(5). For the Housing Unit Minimum, the SHI is presumed to be accurate. 760 CMR 31.04(1)(a). However, a party may challenge this presumption, and then the Committee is required to determine if the identified housing has been properly categorized by DHCD. 760 CMR 31.04(1)(a).

B. The Wrentham Developmental Center.

The Board has challenged Wrentham's SHI number because it does not include units of housing at the Wrentham Developmental Center. The Board states that the WDC is one of

2. Neither party submitted a copy of SHI. However both parties drew our attention to it. Therefore, under 760 CMR 30.10(2)(a), we take official notice of SHI and its accompanying documents, and we have included these documents in the record. They are also available at <http://www.mass.gov/dhcd/components/hac/subhous.htm> (accessed 7/13/2005).

several developmental centers operated by the Commonwealth of Massachusetts to benefit the mentally disabled.³ It was built in 1907 and has been in operation since then. Until the 1980s most of the state's mentally disabled population lived in similar developmental centers or in psychiatric hospitals. Slowly during that decade residents were able to choose from a broader spectrum of living arrangements. By 1993 a consent order issued by the U.S. District Court for the District of Massachusetts mandated changes in the operation of developmental centers and further mandated that individuals who left the developmental centers should be afforded equal or better services in their new residences. Many of these new residential settings are called group homes. The Board indicates that a substantial number of the remaining residents of development centers are no more impaired than those who left. Most of them are adults who have lived at WDC since adolescence, and are more comfortable with the communal, campus lifestyle of developmental centers.

C. The Laws and Regulations establishing WDC

Our initial line of inquiry is dictated by the Committee's regulations which instruct us to:

first be guided by the intent expressed in the regulations governing the program under which the housing is financed. (*e.g.* 760 CMR 45.06 for the Local Initiative Program and 760 CMR 37.10 for the HOP program).

760 CMR 31.04(1)(a). Both of the regulations used as examples clarify that the purpose of their respective programs is related to affordable housing.⁴ WDC is operated by the

3. WWC makes no allegations of fact in regard to the Wrentham Developmental Center. We will see that even under the facts as alleged by the Board, Wrentham has not met its Housing Unit Minimum.

4. The Local Initiative Program's purpose it to "support Low or Moderate Income Housing." 760 CMR 45.06. All of 760 CMR 37.00 was repealed including 37.10, which described the circumstances necessary to consider a Homeownership Program (HOP) Development for a comprehensive permit and to count HOP units towards SHI. HOP still exists and is guided by 760 CMR 20.00 which specifically states that it replaces 760 CMR 37. There is no provision equivalent

Massachusetts Department of Mental Retardation (DMR). See G.L. c. 19B, § 7, and 115 CMR 3.03. Section 12 of G.L. c. 19B provides that MDR shall provide services for the mentally retarded including developmental centers, and § 13 provides that the services should include diagnostic, training, school, residential, and employment services. Unlike the examples provided by 760 CMR 31.04, there is no mention of affordable housing in any of MDR's laws or regulations. Therefore under this line of inquiry, it seems that WDC's units should not be included in SHI.

D. DMR and DHCD's Decision to not Report WDC as Affordable Housing

Under Regulation 30.02 the Department of Mental Retardation (DMR) and the Department of Mental Health are required to report facilities which they determine should be considered affordable housing. 760 CMR 30.02. Specifically, the regulation states the following:

Low or moderate-income housing shall include housing subsidized by the federal, state, or local government to provide long-term housing for individuals who are mentally ill or mentally retarded, including all group home units in each community as reported annually to the Department by the department of mental health and department of mental retardation.

760 CMR 30.02. The Associate Deputy Director for DHCD Policy explained the joint decision of DHCD and DMR to not report the housing provided by WDC as affordable housing in a memorandum dated March 24, 2005.⁵ In the memorandum, the Associate Deputy Director noted and all parties agree that the institutions such as WDC:

are located on a campus-like setting and with on-site staffing such as direct care workers, nurses, psychologists, clinicians, therapists, qualified mental

to 37.10, but 760 CMR 20.02 defines HOP as "established ... to assist Low or Moderate Income Household to acquire affordable homes."

5. Both the Board and WWC submitted a copy of the memorandum from the Associate Deputy Director, which addresses DHCD and MDR's joint finding that the Wrentham Developmental Center is not affordable housing within the meaning of chapter 40B.

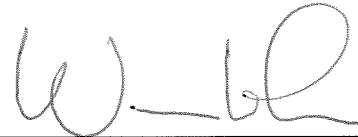
retardation professionals and other specialists. Most of the day programming and recreational activities that residents participate in takes place on campus.

Because of this, it is DHCD's position that WDC's units should not be included in SHI. This position is also reflected in SHI's Eligibility Summary which lists prisons, special needs schools, and military housing as not eligible to be included as affordable housing on SHI. Given the deference to the reporting of DHCD required by 760 CMR 30.02 and the presumption required by 760 CMR 31.04(a)(a), the Committee cannot say that this is an unreasonable position.

III. CONCLUSION AND ORDER

The laws and regulations governing the Wrentham Developmental Center do not express an intent to address affordable housing. Furthermore, the Department of Housing and Community Development and the Department of Mental Retardation have expressed a reasonable determination that the Wrentham center is not affordable housing. Therefore, I conclude that the Board has failed to prove its affirmative defense, and I deny the motion to dismiss.⁶ Consequently, this case is remanded to the Wrentham Board of Appeals for hearing on the merits, and the Committee retains jurisdiction over the matter.

Housing Appeals Committee



Werner Lohe
Presiding Officer

Dated: July 13, 2005

Robert Dickens Smith, Research Counsel

6. The presiding officer has the power to rule on this issue without consultation with the full Committee. 760 CMR 30.09(5)(b).